> "We think that this highly penal statute cannot apply to any lawful department, so as that a fraud upon the United States can arise from or be involved in any transaction concerning it, unless such lawful department is created by Congress or directly authorized by it, and in addition thereto it must be 'such a lawful department' as that Congress appropriates the public moneys to maintain and operate. Clearly the post exchange described in the indictment in this case is not such a lawful department of government."

The majority of the court in the *Keane* case also appear to have assumed that the War Department has recognized the so called "purely private" character of post exchanges, stating (pp. 581-2):

> "In this connection it may be mentioned that these post exchanges are such purely private organizations for the convenience and pleasure of the soldiers themselves that they have been required to pay floor taxes on tobacco under section 702 of the Revenue Act of February 24, 1919 (Comp. St. Ann. Supp. 1919, Sec. 6204d). The Judge Advocate General's Office, a branch of the War Department, held that these exchanges were subject to floor taxes on tobacco. See Opinions of the Judge Advocate General, 3313, February 28, 1919."

This is the only ruling of the Judge Advocate General which the court cites. We have seen that it was reversed by the *Panhandle* case. We have also seen that the Judge Advocate General has uniformly held that post exchanges are official departments of the government. In view of this situation, it is patent that the court was improperly advised in its assumption that the War Department regarded post exchanges as private in character.

The second case at variance with our contentions concerning the status of the post exchange is *Thirty-first Infantry Post Exchange v. Posadas*, 54 Phil. 866. Plaintiff sought an injunction to restrain the Collector of Internal Revenue in the Philippine Islands from collecting a tax levied by the insular government on sales made to the post exchange. The court considered the *Panhandle Oil Company* case but distinguished the situation presented in the case before it on three major grounds. It argued that (1) while the plaintiff in error in the *Panhandle Oil Company* case was an oil company which had been sued by the state to recover taxes, the plaintiffs in the Philippine case were not the persons who had paid the tax; (2) in the *Panhandle Oil Company* case the law in question was the act of a state legislature, but in the Philippine case the laws in question were acts of the Philippine legislature which had been ratified by Congress after passage and raised to the level of organic laws; and (3) in the *Panhandle Oil Company* case the sales had been made to the Coast Guard Fleet and a Veterans' Hospital which were instrumentalities authorized by the constitution, but in the Philippine case the sales were made to a post exchange not so authorized.

Certiorari was denied by this court (283 U. S. 839). In the petition for the writ six questions were presented, including (a) the right of the purchaser rather than the seller to maintain the action, and (b) the effect of congressional ratification upon the Philippine statute. The refusal of this court to review the case may well have been based upon its concurrence in the views of the insular court on either of these two points. The question of the status of the post exchange as a federal instru-

mentality was but one of the six questions presented. It is earnestly submitted that in this regard the Philippine court was in error and that the affirmative case which is made in the long line of authorities and opinions which we have cited supports and requires the exemption of post exchanges from the levy of the California tax. The questions of the proper party to the action and congressional consent to the imposition of the tax are not present in our case. We are returned, therefore, to the situation presented in the *Panhandle Oil Company* case if the post exchanges as a federal instrumentality on a plane similar to that of a Veterans' Hospital or a Coast Guard Fleet.